

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
)	WC Dkt. No. 07-38
Providing Eligible Entities Access to Aggregate)	
Form 477 Data as Required By the Broadband)	GN Dkt. No. 09-47
Data Improvement Act)	
)	GN Dkt. No. 09-51

COMMENTS OF TW TELECOM

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tw telecom inc. (“TWTC”), by its attorneys, hereby file these comments in response to the public notice released in the above-referenced dockets.¹

I. INTRODUCTION AND SUMMARY

The location and characteristics of broadband service providers’ offerings is among the most commercially sensitive information in the telecommunications industry. The FCC has recognized this fact by treating such information collected from carriers on Form 477 as confidential and not subject to public disclosure either in its industry 477 Reports or in response to requests for access to the information under the Freedom of Information Act (“FOIA”).²

In this proceeding, the FCC must balance the need to prevent disclosure of confidential information against the important policy goals of the broadband mapping

¹ *Providing Eligible Entities Access to Aggregate Form 477 Data as Required By the Broadband Data Improvement Act*, Public Notice, WC Dkt. No. 07-38, GN Dkt. Nos. 09-47 & 09-51, DA 09-1550 (rel. July 17, 2009).

² 5 U.S.C. § 552.

initiative outlined in the Broadband Data Improvement Act (“BDIA”).³ The development of accurate broadband maps is critically important to the implementation of an effective national broadband plan. Detailed and comprehensive broadband maps will enable the government to target broadband programs to those areas where residents and businesses lack the necessary infrastructure to participate in today’s information economy.⁴

It follows that entities receiving BDIA grants (“grantees”⁵) to fund the development of broadband maps need access to comprehensive data regarding service providers’ service broadband offerings and network deployment. This means that they need access to confidential, disaggregated data provided by carriers on Form 477 on a census tract basis, and they will likely also need more detailed information as the mapping process progresses.

In order to strike the appropriate balance between protecting confidential information from unnecessary disclosure and ensuring that grantees have access to the information they need to develop accurate and detailed maps, the FCC should devise a means of disclosing confidential information to the grantees but not to competitors or the public. The agency can do so by adopting a policy that it will disclose disaggregated Form 477 data to grantees subject to the condition that the grantees treat the information

³ See Broadband Data Improvement Act of 2008, Pub L. No. 110-385 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-1305 (“BDIA”).

⁴ See Dep’t of Commerce, NTIA, State Broadband and Development Grant Program, Notice of Funds Availability and Solicitation of Applications, RIN 0660-ZA29, 74 F.R. 32545, 32546 (July 8, 2009) (“NOFA”) (“The BDIA is intended to improve data on the deployment and adoption of broadband service to assist in the extension of broadband technology across all regions of the United States.”).

⁵ See 47 U.S.C. § 1304(i) (defining the categories of eligible entities which may receive grants).

as confidential and use it solely for the purpose of developing broadband maps pursuant to the BDIA and the NTIA's Notice of Funds Availability ("NOFA"). The FCC should treat other confidential information it collects from carriers and provides to grantees in the future in a similar fashion. Moreover, when the grantees complete the broadband maps, the FCC should work with NTIA to identify portions of the completed maps that include information that would be considered confidential and not to be disclosed to the public under the FCC's FOIA jurisprudence. The public should be provided access to the broadband maps with such confidential information redacted while the NTIA and the FCC have access to the unredacted maps to assist them in developing and implementing a national broadband plan.

II. THE FCC HAS DETERMINED THAT DISAGGREGATED 477 DATA IS CONFIDENTIAL PURSUANT TO FOIA

Since the creation of the Form 477 in 2000, the FCC has treated disaggregated Form 477 data as confidential. The FCC has found that release of this disaggregated data harms carriers' competitive interests and the interests of the FCC in collecting reliable information from carriers. Accordingly, the FCC's publicly available 477 Reports protect carriers' disaggregated data from public disclosure by aggregating the data at a sufficiently high level to ensure that an individual carrier cannot be associated with any particular datapoint. In those cases where even aggregated data would link a datapoint to a particular provider, the FCC completely masks the data with an asterisk.⁶ This approach comports with the policy embodied in Exemption Four of the FOIA, which

⁶ For example, in its most recent 477 Report, the FCC has masked the number of cable modem lines in Alaska, the number of SDSL connections between 10 and 100 Mbps and the number of fixed wireless lines greater than 25 Mbps. *See* Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, High-Speed Services for Internet Access: Status as of June 30, 2008, at Table 5, Table 9.

protects carriers' trade secrets, commercial information and financial information from disclosure.⁷

In implementing the BDIA, the FCC and NTIA should continue to prevent public disclosure of commercially sensitive information regarding carriers' service offerings and network deployment. Promotion of broadband deployment is a key purpose of the BDIA.⁸ But public release of carriers' confidential information would frustrate this purpose by providing critically important data to carriers' competitors. Carriers' position in the marketplace would be harmed and their ability to deploy broadband nationwide would be reduced. Such an outcome would undercut the core goal of the BDIA to facilitate the creation of accurate broadband maps.⁹

A. The Interests Advanced By FOIA Exemption Four

In determining whether the disaggregated information, or indeed any information supplied to the government, should be considered confidential and shielded from public disclosure, government agencies, including the FCC and NTIA, must look to the FOIA and agency and judicial interpretations of the FOIA. While most information in the possession of the government may be released to the general public pursuant to a FOIA request, there are seven categories of information, so-called "exemptions," under which the government may refuse to release information absent a further showing that release of

⁷ The exemption protects "trade secrets and commercial or financial information" provided to the government from public disclosure. *See* 5 U.S.C. § 552(b)(4).

⁸ *See* 47 USC § 1304(a)(1) ("The purposes of any grant under subsection (b) are--to ensure that all citizens and businesses in a State have access to affordable and reliable broadband service.").

⁹ *See* 47 USC § 1301(3) ("Improving Federal data on the deployment and adoption of broadband service will assist in the development of broadband technology across all regions of the Nation.").

the information is justified. The Exemption Four prohibition against disclosure of “trade secrets and commercial or financial information” is of particular relevance to this proceeding.¹⁰

In two leading cases, *National Parks* and *Critical Mass*,¹¹ the D.C. Circuit established the tests for determining whether information provided to the government is “confidential” within the meaning of Exemption Four. Information submitted voluntarily is deemed “confidential” if (1) its disclosure would impair the government’s ability to obtain the cooperation of parties to submit information in the future,¹² or (2) the information is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”¹³ Information submitted under compulsion is “confidential” if disclosure of the information is likely to (1) impair the government’s

¹⁰ See 5 U.S.C. § 552(b)(4).

¹¹ See *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (“*National Parks*”); *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (“*Critical Mass*”).

¹² See *Critical Mass*, 975 F.2d at 873, 878 (“Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials, and the ability of the Government to make intelligent, well informed decisions will be impaired. . . . Thus, when information is obtained under duress, the government’s interest is in ensuring its continued reliability; when that information is volunteered, the Government’s interest is in ensuring its continued availability”).

¹³ See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, ¶ 4 (1998) (“*Examination of Confidential Information Policy*”) (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc)) (internal quotation marks omitted); see also *Thomas N. Locke Freedom of Information Act Request*, Order, 8 FCC Rcd 8746 n.3 (1993) (noting that the FCC need not decide the factual issue of whether the record was submitted on a “required” or “voluntary” basis because the submitting party had already met the more stringent test for determining whether data submitted on a required basis is confidential).

ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person submitting the information.¹⁴

B. The FCC’s Application of Exemption Four To Disaggregated Form 477 Data

The FCC’s rules governing the treatment of confidential information track the language of FOIA Exemption Four.¹⁵ In determining whether information is confidential, the FCC applies the tests from *Critical Mass* and *National Parks* as well as other FOIA jurisprudence. *See generally Examination of Confidential Information Policy*. Therefore, if the FCC determines that information submitted by a party is confidential, the FCC treats the information as encompassed by Exemption Four.

In applying this legal framework, the FCC has determined that disaggregated data is confidential pursuant to FOIA Exemption Four. In its 2000 order establishing the requirement to submit Form 477, the FCC found that, even though the Form 477 data collection is a “mandatory collection,” the public should only have access to aggregated Form 477 data.¹⁶ The FCC determined that this approach would increase the chances that it receives compete and accurate information regarding service offerings. *See id.*

¹⁴ *Examination of Confidential Information Policy* ¶ 4 (quoting *National Parks*). This is known as the “*National Parks* two-pronged test.” *See also Critical Mass*, 975 F.2d at 878 (“ While we indicated [in *National Parks*] that the governmental interest is unlikely to be implicated where the production of information is compelled, we have since pointed out that there are circumstances in which disclosure could affect the reliability of such data. . . . Thus, when dealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible effect of disclosure on its quality.”).

¹⁵ *See* 47 C.F.R. § 0.457(d) (entitled “*Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection*”).

¹⁶ *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, ¶ 91 (2000) (“*2000 Order*”).

In 2006, the FCC went further and expressly held that disaggregated Form 477 data falls within Exemption Four. In particular, the Wireline Competition Bureau, acting on delegated authority from the Commission, denied a FOIA request for access to information regarding the location (by zip code) and capacity of carriers' broadband service offerings submitted on FCC Form 477.¹⁷ The Bureau noted that previous FCC orders clearly held that disaggregated data should not be released to the public. *See WCB Letter* at 2. The Bureau observed that “[f]ilers customarily guard this data [concerning the location and capacity of broadband offerings] from their competitors, and release would harm their competitive interests by revealing to competitors their market strategies, their customer identities and counts, and where they have deployed their services.” *Id.* For these reasons, the Bureau found that the disaggregated data is confidential “pursuant to FOIA Exemption 4.”¹⁸ On appeal, the District Court for the District of Columbia upheld the Bureau’s decision, finding that publicly available zip code data could “reveal what customers had been acquired or lost,” “could allow

¹⁷ *See* Letter from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, FCC, to Drew Clark, Senior Fellow and Project Manager, The Center for Public Integrity at 1-2 (Sept. 26, 2006), (“*WCB Letter*”) available at <http://projects.publicintegrity.org/docs/telecom/telecomfoia/Response.pdf>.

¹⁸ *Id.* at 2. (“We find that the requested database and associated documentation constitute commercially sensitive, competitive information. Filers customarily guard this data from their competitors, and release would harm their competitive interests by revealing their market strategies, their customer identities and counts and where they have deployed their services. For example, competitors could use this data to decide where to target their service offerings, facilities construction, and marketing, all to the detriment of Form 477 filers.”).

competitors already serving new markets to respond to new entry,” and could “assist competitors in designing specific competing offers to target the identified customer.”¹⁹

If anything, confidential treatment of disaggregated Form 477 data is even more justified today than it was in 2006. Pursuant to the FCC’s 2008 data reporting order, carriers must now submit information on a census-tract basis.²⁰ Census tract-level data provides a more granular view of providers’ networks than the zip-code-level data submitted prior to 2008. As the FCC recognized in its *2008 Order*, broadband providers believe that the more granular the data, the greater the harm that results from disclosure of such information.²¹ There should therefore be no question that disaggregated Form 477 data is confidential.

Moreover, once the FCC makes a determination that information is confidential pursuant to Exemption Four, that determination and the protection provided by Exemption Four is not lost if the FCC provides the information to another agency or to a third party subject to appropriate protections.²² Because the FCC is the custodian of any

¹⁹ *Center for Public Integrity* at 16 (slip opinion). The FCC should now, as AT&T urges, formally codify that Form 477 data is confidential and create a presumption against the disclosure of such data. See Comments of AT&T, WC Dkt. No. 07-38, at 15 (filed Aug. 1, 2008).

²⁰ See *Developing Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans et al.*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008).

²¹ See *id.* ¶ 11 (“Commenters opposing 9-digit ZIP codes argue that reporting broadband subscribership information at that level would be inappropriate, would result in confidentiality problems, or would simply be too expensive.”); *id.* at n.32 (“AT&T and others are concerned about the privacy and confidentiality of reported data at the 9-digit ZIP Code level, fearing that detailed knowledge of a competitors’ subscriber coverage might be problematic.”).

²² *Allnet Communication. Servs. v. FCC*, 800 F. Supp. 984, 989 (D.D.C. 1992) (finding that FCC had not waived protections under FOIA Exemption Four if information was

records it collects from carriers, the FCC, not NTIA or the grantee, must review any FOIA request by a third party to view the disaggregated data and determine whether release of the data is permitted.²³

III. GRANTEES SHOULD BE PROVIDED WITH ACCESS TO DISAGGREGATED 477 DATA SUBJECT TO APPROPRIATE CONFIDENTIALITY PROTECTIONS

The need to treat disaggregated network location and service offering information as confidential must be balanced against the need to provide grantees with detailed information so that broadband maps are comprehensive and accurate. Indeed, broadband maps are a critical component of developing and implementing an effective national broadband policy.

Accordingly, grantees should be permitted to receive and analyze disaggregated Form 477 data as long as appropriate protections are established to prevent public disclosure. In providing such data to grantees, the FCC must (1) not provide disaggregated data to entities that are direct or indirect competitors to any carrier whose disaggregated 477 data is made available and (2) ensure that grantees sign a confidentiality agreement mandating that they will provide at least as high a level of protection to the disaggregated 477 data as is provided by the FCC.

Such an approach is appropriate because the confidentiality provisions of the BDIA and NOFA closely track the language of FOIA Exemption Four, indicating that

provided to a private third party pursuant to a confidentiality agreement); see also *Students Against Genocide v. Department of State*, 50 F. Supp. 2d 20, 25 (D.D.C. 1999). (“[O]nly the agency that is the original source of classified information can waive its right to assert an exemption under FOIA.”).

²³ Entities making a FOIA request must show that access should be granted to the entity notwithstanding the application of Exemption Four. See *Examination of Confidential Information Policy* ¶ 8.

Congress intended that grantees should be bound by Exemption Four.²⁴ The FCC already permits state PUCs access to disaggregated data pursuant to a similar model²⁵ and several states have opted-into this program.²⁶ Therefore, FCC should adopt this model when providing disaggregated data (and, as explained below, other confidential carrier data) to grantees.²⁷

²⁴ Compare 47 U.S.C. § 1304 (h)(2) (“Notwithstanding any provision of Federal or State Law to the contrary, and eligible entity shall create any matter that is a trade secret, commercial or financial information, or privileged or confidential as a record not subject to public disclosure...”) with FOIA Exemption 4, 5 U.S.C. § 552(b)(4) (protecting from disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”); NOFA at 32550 (“The BDIA requires that to be eligible to receive a grant under this program, entities must agree to treat any matter that is a trade secret, commercial or financial information, or privileged or confidential as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and the entity.”).

²⁵ See 2000 Order ¶ 95 (“[T]he chief of the Common Carrier Bureau may release the information collected under this program to the state commissions, subject to certain conditions. A state Commission may view all data submitted on a carrier specific basis, by entities filing data for that commission’s state, provided that the state has appropriate protections in place (which may include confidentiality agreements or designation of information as proprietary under state law) that would preclude disclosure of confidential information. However, where state laws afford less protection than federal FOIA laws, the higher Federal standard will prevail.”); *Local Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340, ¶ 26 (2004) (“We also decide to retain our current policies and procedures regarding the sharing of Form 477 data with state commissions. Such data sharing only occurs where state entities formally declare to use that they are willing and able to treat submitted information subject to restrictions on data release that are at least as stringent as federal requirements.”).

²⁶ See, e.g., Reply Comments of the Michigan Public Service Commission, WC Dkt. No. 07-38, WC Dkt. 07-38, at 2 (filed Aug. 28, 2008) (describing their receipt of disaggregated 477 data pursuant to a non-disclosure agreement.)

²⁷ See Joint Comments of Verizon and Verizon Wireless, WC Dkt. No. 07-38, at 13 (filed Aug. 1, 2008) (“For the same reasons that the Commission could not lawfully disclose commercially sensitive information from a provider’s Form 477 in response to a FOIA request, it should not disclose such information to another governmental agency or share such information with private-public partnerships such as ConnectKentucky without ensuring at least a comparable level of protection of providers’ competitively sensitive information.”).

In addition, the FCC must establish a consistent policy for protecting other confidential information it might collect and provide to grantees in the future. The NOFA recognizes that the FCC has the right and obligation to protect confidential information collected from carriers and provided to grantees prior to the release of that information to the public.²⁸ It follows that the FCC must ensure that grantees' confidentiality agreements with the FCC described above cover not just disaggregated Form 477 data, but all confidential data provided to grantees.

In addition, the FCC must establish a process under which it determines whether any data it plans to provide grantees in the future should be considered confidential pursuant to FOIA Exemption Four. Such safeguards are absolutely necessary because, as explained above with respect to disaggregated data, if the FCC fails to adequately protect all confidential data provided to grantees, the very purposes of the BDIA will be frustrated and carriers will be significantly harmed. As it did in its recent public notice with respect to 477 data, the FCC should request comment on the extent to which it should treat as confidential any data requested by grantees (or by NTIA on behalf of grantees). This would be quickly followed by an order determining the extent to which grantees may receive the information and, to the extent that they may, the extent to which grantees must prevent disclosure of the information.

Once the grantees have created broadband maps utilizing the confidential information made available to them, the FCC and NTIA must determine the extent to which those maps reveal confidential information provided to grantees by the FCC or any

²⁸ See NOFA at 32549 (“NTIA and the FCC may otherwise aggregate, combine or mask broadband service provider data, and take other steps so as to make such data suitable for public release.”).

other government agency. After review, if the FCC and NTIA determine that the maps reveal such information, the information should be masked or redacted from the version of the maps made available to the public on the NTIA's website. Of course, the government agencies themselves would have access to the fully unredacted versions of the maps to assist them in developing and implementing the national broadband plan.

IV. CONCLUSION

The FCC should adopt regulations governing the provision of Form 477 data and other data to grantees on the terms and conditions described herein.

Respectfully submitted,

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